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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 7

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. MCKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LAPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1964

No. 527

THE HANNA MINING COMPANY, NATIONAL STEEL CORPORATION, HANSAND STEAMSHIP CORPORATION, and THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice-President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Whether a state court may enjoin peaceful picketing by a labor organization where the NLRB has never ruled on the specific picketing sought to be enjoined and such picketing arguably constitutes secondary boycott activity in violation of Section 8(b)(4) of the Act and occurred at a different situs from activity which was the subject of an 8(b)(4) charge filed with the NLRB.

2. Whether the state court properly refused to enjoin peaceful picketing by a labor organization (a) where the General Counsel of the National Labor Relations Board refused to issue a complaint on petitioners' charge of violation of Section 8(b)(4) of the National Labor Relations Act on the ground that the evidence was insufficient to establish unlawful secondary activity, and (b) where the General Counsel of the NLRB refused, because of the supervisory status of the employees involved, to issue a complaint on petitioners' charge that the same picketing also constituted organizational picketing in violation of 8(b)(7) of the Act.

Statement

Petitioners seek to upset a decision of the Wisconsin Supreme Court which held that the state court did not have jurisdiction to enjoin peaceful picketing by members of respondent Union because the regulation of such activity is exclusively within the jurisdiction of the NLRB.

Respondent Union was the exclusive bargaining agent for the employees of the petitioners under an agreement entered into between the parties on October 4, 1961 following a secret election among said employees, which agreement expired by its terms on July 15, 1962. On September 12, 1962, after a period of unsuccessful negotiations for a new contract the Union began picketing the petitioners' vessels. (R. 71-73).

On September 12, 1962, petitioners filed a petition for a representation election with the Regional Director of the National Labor Relations Board. The Regional Director dismissed the petition on the grounds that "the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act,[1] being employed as supervisors as defined in Section 2(11)." (R. 86).

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[1] National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U. S. C. § 151-168.

On September 15, 1962, petitioners filed a charge with the Regional Director of the National Labor Relations Board claiming that respondents' picketing in *Duluth, Minnesota* constituted secondary boycott activity in violation of Section 8(b)(4) of the Act. (R. 79-80). The Regional Director refused to issue a complaint and the General Counsel sustained his ruling on the ground that "the evidence was insufficient to establish that either respondent engaged in unlawful secondary boycott activity as alleged." (R. 48-49).

On September 27, 1962, the petitioners filed a charge with the Regional Director of the National Labor Relations Board claiming that the very conduct which it had charged constituted illegal secondary boycott activity, violated Section 8(b)(7) of the National Labor Relations Act as illegal recognition and organizational picketing. (R. 80-81). The Regional Director refused to issue a complaint and the General Counsel sustained his ruling on the ground that "the Union was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act." (R.54).

On June 25, 1963, petitioners instituted an action in the Circuit Court for Douglas County in the State of Wisconsin, to enjoin the picketing being conducted by respondent Union in *Superior, Wisconsin*. (R. 9-19). The conduct complained of in that suit related to picketing activity which had not been the subject of any NLRB charges filed by the petitioners and therefore had not been considered or acted upon by the Board.

The Circuit Court granted a temporary restraining order but on respondents' motion to dismiss the complaint the court vacated the temporary restraining order and dismissed the complaint on the ground that it did not have jurisdiction since the "complaint in this case, at least 'arguably', alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board." (R. 6).

The Wisconsin Supreme Court unanimously affirmed the decision of the Circuit Court holding that the ruling of *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959) required the state court to decline jurisdiction under the circumstances of this case. The court stated that "since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to enjoin it. On the record before us we can perceive no escape consistent with the *Garmon* decision." 127 N. W. 2d 393, 399.

I

The decision below is clearly correct.

A. No Charge Was Filed With the NLRB and No Determination Was Ever Made by the NLRB Regarding the Legality of the Picketing Activity in Superior, Wisconsin; Such Picketing Was Arguably Subject to Section 8(b)(4) of the Act and the State Court Was Without Power to Enjoin Such Conduct

Since the Wisconsin Supreme Court decided that the rule in the *Garmon* case required that the state decline jurisdiction over the peaceful picketing activity involved herein, it did not find it necessary to discuss the "difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota," although the court thought that it "may well be of significance" and that the two activities "must at least differ in detail, if not in relevant substance." 127 N. W. 2d 393, 398-399.

The picketing activity which is the subject of the state court action occurred in Superior, Wisconsin. (R. 73). The situs of the picketing which was the subject of petitioners' charge of illegal secondary activity was Duluth, Minnesota. (R. 79-80). The action of the Regional Director, sustained by the General Counsel, in refusing to issue a complaint on the 8(b)(4) charge, as well as on the 8(b)(7) charge, related to the *Duluth* picketing. Thus the *Superior* picket-

ing was never passed upon by the Regional Director or the General Counsel and was therefore still arguably subject to Section 8(b)(4) of the Act when petitioners commenced their state court action to enjoin such activity.

B. Assuming That the Charges Filed With the NLRB Covered the Picketing in Superior, Wisconsin, the State Court Had No Jurisdiction to Enjoin Peaceful Picketing Which Arguably Constituted a Secondary Boycott Subject to NLRB Jurisdiction, Since the NLRB Had Refused to Issue a Complaint Thereon Solely Because of Insufficient Evidence

The General Counsel of the NLRB refused to issue a complaint on petitioners' charge that the picketing constituted secondary boycott activity in violation of Section 8(b)(4) of the National Labor Relations Act. The stated basis for the General Counsel's ruling was that there was insufficient evidence to establish a violation of 8(b)(4).[2] The action of the General Counsel constituted a recognition and assumption rather than a denial of NLRB jurisdiction.

In *Graybar Electric Co.* v. *Automotive Industries Employees,* 365 Mo. 753, 770, 287 S. W. 2d 794 (1956), the Supreme Court of Missouri stated:

> "* * * The Regional Director 'made an investigation' of the charges filed by plaintiff and refused to issue a complaint. Thereafter, on appeal to the General Counsel, he found that 'there is insufficient evidence to warrant further proceedings' * * * Such a finding in and of itself precludes any legitimate contention that the Board declined to accept jurisdiction of the controversy. Rather does it definitely re-

[2] Petitioners do not appear to challenge and the record in fact affirmatively establishes (R. 65) that the respondent Union was a "labor organization" within the meaning of the National Labor Relations Act and therefore accountable under the Act for activity which would violate the Section 8(b)(4) proscription against secondary boycotts. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.,* 370 U. S. 173 (1962).

> flect that the Board did exercise its jurisdiction, did consider the evidence, and did decide that the evidence did not warrant further action."

See also:

> *Mississippi Valley Electric Co.* v. *Teamsters,* 229 La. 37, 85 So. 2d 22 (1955);
> *Wilmot* v. *Frank,* 19 App. Div. 2d 542 (N. Y. 1963).

The requirements of federal labor policy thus left the Union free to engage in the peaceful picketing activity complained of and the state court had no power to enjoin such picketing. The assumption of jurisdiction by the Board deprived the Wisconsin courts of jurisdiction over the same picketing activity. This foreclosure of state action is not altered by characterization of the picketing in the state court as "organization and recognition" rather than "secondary." "It is not the label affixed to the cause of action that controls the determination of the relationship between state and federal jurisdiction." *Local 100 United Ass'n of Journeymen* v. *Borden,* 373 U. S. 690, 698 (1963).

Nor is the foreclosure of state action altered by the fact that petitioners had also filed a charge with the NLRB alleging that the picketing was illegal organization picketing in violation of Section 8(b)(7) of the Act and the Board refused to issue a complaint on that charge because the engineers involved in the dispute were supervisors. The failure of the Board to assume jurisdiction over the activity for purposes of 8(b)(7) did not leave the state free to regulate activity which it is precluded from regulating because of the Board's assumption of jurisdiction under 8(b)(4). *San Diego Building Trades* v. *Garmon, supra; Guss* v. *Utah Labor Relations Board,* 353 U. S. 1 (1956).

As this Court stated in *Garner* v. *Teamsters,* 346 U. S. 485, 500 (1953): "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare

picketing free for purposes or by methods which the federal Act prohibits." [3]

We do not read the Wisconsin Supreme Court's decision as do the petitioners, that its holding is based on whether a ruling of the General Counsel sustaining a Regional Director's refusal to issue a complaint is "final" or not "final" in the sense of appealability. The statement of the Wisconsin Court that petitioners did not "properly accord final legal significance to the acts of the General Counsel" was in reference to the fact that under the circumstances the rulings of the General Counsel did "not define the nature of the activity with unclouded legal significance" under the *Garmon* doctrine.

As this Court said in the *Garmon* case a state may not act where the NLRB by its action failed "to determine the status of the disputed conduct * * * by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance." *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 245.

In any event, as has already been noted above, the action of the General Counsel in declining to issue a complaint under 8(b)(4) solely because of the insufficiency of evidence, constituted an affirmative assumption of jurisdiction by the NLRB and precluded the state from acting with respect to the same activity.

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[3] In *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252 (1964), this Court stated:

> "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted Section 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (at 259).

If the result of the Board's assumption of jurisdiction and its failure to issue a complaint on a charge of violation of Section 8(b)(4) because of insufficient evidence and its failure to assume jurisdiction for purposes of Section 8(b)(7) of the Act in regard to the same activity appear to leave the petitioners without a remedy to enjoin activity which may be subject to one section of the Act but not to another, the solution cannot be found in judicial rewriting of the Act but must be left to Congress. *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1956).

II

There is no conflict of decision.

Petitioners point to no decision, state or federal, which conflicts with the holding of the Wisconsin Supreme Court. Indeed, the decision below is completely in accord with the decisions of this Court on the subject of federal preemption in this field of labor relations. *Local 20, Teamsters* v. *Morton, supra; San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959); *Garner* v. *Teamsters, supra; Guss* v. *Utah Labor Relations Board, supra.*

If the Wisconsin Supreme Court had held otherwise, *i.e.*, if it had held that the state had jurisdiction to enjoin the peaceful picketing involved herein such a decision would have been in direct conflict with the above cited cases and would have raised important questions of federal law which would have necessitated resolution by this Court.

The decision of the Wisconsin Supreme Court supports the doctrine of exclusive NLRB jurisdiction of "activities that are potentially subject to federal regulation" and eliminates the danger of "conflict with national labor policy." *San Diego Building Trades* v. *Garmon, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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